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## **Towards a More Legitimate Form of Direct Democracy in the European Union**

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EUROPEAN

# POLICYBRIEF



## TOWARDS A MORE LEGITIMATE FORM OF DIRECT DEMOCRACY IN THE EUROPEAN UNION

Policy scenarios and recommendations from bEUcitizen, a research project on the barriers to realise and exercise citizenship rights by European Union citizens

Written by  
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December 2016

### INTRODUCTION

This is a policy brief in the bEUcitizen policy brief series. The bEUcitizen project - funded by the European Union - set out to identify, investigate, discuss, and ameliorate the barriers to the active use of rights (and knowledge of duties, the concomitant to rights, in so far as there are any) by European citizens. The project aimed to provide a comparative overview and classification of the various barriers to the exercise of the rights and obligations of European Union citizens in the member states. Simultaneously, the project analysed whether and how such barriers can be overcome and the future opportunities and challenges the European Union and its member states face to further develop the idea and reality of European Union citizenship.

**Drawing on research conducted during the bEUcitizen project<sup>1</sup>, this policy brief explores existing as well as possible future mechanisms of plebiscitary and Direct Democracy in the European Union. The underlying premise is that democratic decision-making devices should be legitimacy-enhancing.** Legitimacy is a degree of acceptance of the polity, the government, and of its decisions by the citizens. Factual acceptance is not sufficient. The latter needs to be determined under justifiable conditions, minimally described as: access to alternative information, transparency, formal participatory equality

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<sup>1</sup> See bEUcitizen report *Taking stock of the European Citizens Initiative: Current dynamics and possible institutional trajectories*, D 8.8, by Cheneval, F., et al., 2016, <https://doi.org/10.5281/zenodo.56099>, and bEUcitizen report *European Union and Direct Democracy: A possible combination?*, D 8.7, by Cheneval, F., and Ferrin, M., 2016, <https://doi.org/10.5281/zenodo.56097>.

of citizens, economic independence of citizens, and collective decision procedures that are as outcome-neutral as possible.

**Direct voting by citizens is a reality in the European Union.** Plebiscites on issues related to European integration have been held for several decades in European Union member states and in states related to European integration. The United Kingdom's referendum on membership in the European Union is only the most recent example. With the European Citizens' Initiative, which allows a citizens' committee that manages to collect at least a million signatures in minimum seven countries to make a policy proposal to the European Commission, the European Union itself has introduced a direct democratic instrument in the Lisbon Treaty.

**However, the adequacy of direct democratic instruments to decide issues related to European integration is under dispute.** Some see Direct Democracy as a decision-making feature that favours populism and undermines European integration. Others contend that Direct Democracy is a means to better connect elite-driven European integration with the citizens in a time when this nexus is becoming ever more fragile. Both can be right, but this depends on the institutional design within which Direct Democracy is enacted.

## KEY OBSERVATIONS

### FIVE PROBLEMS WITH CURRENT REFERENDA

Overall, **there are at least five problems with most European Union-related referenda in member states.** First, it is governments that call European Union referenda in the member states, at their discretion and at times when it suits them or their parties. Exceptions are countries with constitutions requiring obligatory referenda on constitutional change – such as Ireland or Denmark.

If referenda are to be credible direct democratic instruments on specific issues, **there needs to be the possibility for the people to call the referendum,** either by a certain amount of citizen signatures, or by requiring that a referendum on constitutional change needs to be enshrined as a political right of the citizens, i.e. making it obligatory by constitutional disposition. If governments can call the referenda, the latter are merely strategic tools of governmental action. Government-induced referenda increase the realm of discretionary executive power instead of increasing political rights of citizens.

Second, **the result of the referendum needs to be binding in order to be credible.** In most cases, results of European Union-related referenda are consultative. The recent referendum in Greece is a case in point. The government calls a referendum on an austerity package, the people say no, and a week later the government enacts an even more severe austerity package. A similar process was to be observed with the French and Dutch votes on the Constitutional Treaty of the European Union in 2005, when the Treaty was rejected only for most articles to be introduced later into the Lisbon Treaty without a popular vote. Plebiscitary-style referenda do not increase democratic legitimacy but risk to undermine it.

Third, **the serial referenda that took place on the Constitutional Treaty in 2005 created political inequalities among European citizens** because some citizens were at least asked a question and had the right to answer, others were not even asked, and what others have decided was imposed on them under veto rules.

Forth, **there were even political inequalities among European citizens who did get to vote directly because these votes were not held at the same time.** Under unanimity rules, this deprived later votes of all significance once a country has voted no. Democracy means choice. If the procedure itself predetermines the result rather than the choices of the people, there is only a simulation of democracy. The actual practice of referenda in European Union

member states goes in the wrong direction.

Fifth, the bias that is created by referenda can also work against the preferences of the citizen themselves. **Countries that are unfamiliar with Direct Democracy at the national level risk second-order voting when they hold plebiscitary referenda.** People may not answer the question that is asked on the ballot but interpret the vote as a vote on the government, as if it were an election or a confidence vote on the government.

In brief, there are a number of very serious drawbacks to the uncoordinated, plebiscitary, and purely consultative use of referenda in the European Union integration process. Plebiscites should not to be considered Direct Democracy.

THERE IS HIGH  
UNFAMILIARITY  
WITH THE  
EUROPEAN  
CITIZENS'  
INITIATIVE

Regarding the European Citizens' Initiative, the picture is more mixed than in the case of plebiscites, but there are indicators of possibly delegitimising effects: With the exception of Germany, there is high unfamiliarity with the European Citizens' Initiative.<sup>2</sup> **Procedures regulating the European Citizens' Initiative have been judged overly formalistic and bureaucratic and serious structural issues regarding the decentralised implementation, where rules differ from one member state to another, have been highlighted.**<sup>3</sup>

Such problems are very common with agenda initiatives. Legitimacy is theoretically enhanced to the extent that the European Citizens' Initiative opens up a new channel for influencing the policy agenda by increasing responsiveness and ultimately leading to better policy outcomes that are in tune with the preferences of citizens. **But for any of this to happen de facto, there must be reaction to successful agenda proposals.**

Three initiatives have been successfully concluded and submitted to the Commission so far. Apart from a formal response, there has been no policy reaction and one party has already filed a complaint with the Courts. Comparative analysis shows that the agenda initiative instrument is a structurally weak form of Direct Democracy. **Even with the proposed reforms of the European Citizens' Initiative, its legitimacy-enhancing effects will be modest at best.**<sup>4</sup>

FROM  
PLEBISCITARY  
TO DIRECT  
DEMOCRACY

Formally, there are **two distinct procedural devices of Direct Democracy: initiative and referendum.** The initiative is a device to propose new legislation. It stands for a collective right to statute. The referendum puts a governmental or parliamentary decision to vote and thereby stands for a collective right to refute. The initiative is an agenda-setting or legislative device of the people; the referendum is a device of control of the executive and legislative by the people. The two distinct devices should be evaluated separately; they have different and specific advantages and disadvantages.

It is a conceptual error to evaluate collective decision-making devices on the basis of desired outcomes. The legitimacy benchmark of evaluation cannot be the outcome of the vote, since the vote is taken to aggregate preferences of citizens by a procedure that is acceptable to participants independently of their own preferred outcome. The acceptable purpose of the collective decision-making device cannot be to manipulate the outcome towards one option. The content of the preferences and their appropriation by the numbers of the participants should determine the outcome, not the decision-making procedure.

**The correct benchmark of legitimacy for any democratic decision-making device as such is therefore the degree of inclusion of citizens and the**

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<sup>2</sup> See bEUcitizen report *Taking stock of the European Citizens Initiative* (2016), p. 27.

<sup>3</sup> Organ, J. 'Decommissioning Direct Democracy? A Critical Analysis of Commission Decision-Making on the Legal Admissibility of European Citizens Initiative Proposals', *European Constitutional Law Review*, 10 (3), pp. 422-443, 2014.

<sup>4</sup> See bEUcitizen report *Taking stock of the European Citizens Initiative* (2016).

**degree of ex ante outcome-neutrality of the procedure.** Completely undesirable outcomes need to be excluded beforehand. This can be done by judicial review based on enshrined fundamental rights and on formal rule compatibility of candidates and issues put to vote. Everything that is put to vote, just as any candidate that has the right to stand for elections, needs to represent a legitimate option for citizens. This option needs to be chosen via a collective decision-making procedure that is as outcome-neutral as possible.

## POLICY IMPLICATIONS – TWO SCENARIOS

**The key question here is to what extent Direct Democracy can and ought to be considered as a potentially legitimacy-enhancing device for European Union member states and the European Union in the future.** Forward looking, we can distinguish two legitimacy-scenarios for the European Union. The basic assumption of the scenarios is that debt, terrorism, and refugee crises, if nothing else, have put the legitimacy of the European Union and of the pro-European Union national governmental parties under pressure, leading to a significant diminution of its legitimacy. From this vantage point, we can distinguish two scenarios:

### SCENARIO 1: MAINTAINING THE STATUS QUO

The **European Union** maintains the status quo of its decision-making procedures. It **refrains from using more explicit Direct Democracy mechanisms at the European Union level but continues to be subjected to the consequences of national plebiscites.** Somehow, it manages to keep its terrorism, refugee, and debt crises under control and regains a permissive consensus of citizens who accept European politics as usual and are content with the current standard of political rights of representative democracy, with occasional plebiscites and the European Citizens' Initiative as we know it.

### SCENARIO 2: DEEPENING LEGITIMACY CRISIS

The legitimacy crisis persists or deepens as the above-mentioned crises linger on. **The citizens' acceptance of European institutions and decisions further erodes and new conflicts become salient,** such as the struggle over a new transatlantic trade agreement. Meanwhile, European Union citizens will increasingly revert to the nation-state as locus of legitimate democratic self-government, while national governments will be forced to favour what is perceived as the national interest. This will exacerbate the collective decision-making problems of the European Union and block its policy processes. Consequently, the European Union's decision-making procedures will increasingly come under pressure to be more participatory and inclusive.

### THE PLAUSIBLE SCENARIO

**Scenario 1 is plausible when it comes to a stabilised handling of the most urgent aspects of the debt, terrorism, and refugee crises.** Several important decisions to build more robust European institutions regarding banking practices, fiscal discipline, refugee policy etc. are under way or have been taken. However, Scenario 1 is overly optimistic for an objective reason: the erosion of the permissive consensus towards ever more European integration has not started with the current crises but with the change to a more explicitly political integration process since the Maastricht Treaty.

The current crises have exacerbated a previously soft-footed legitimacy loss of the European Union that is of a more profound political nature and touches upon questions of sovereignty and self-government. For these structural reasons, Scenario 2 is the more likely scenario. One should not overstate its consequences. From all we know about the right-wing parties and their overall strength, it is unlikely that the European Union as such comes apart. The economic stakes of the common market are too high.

However, **Scenario 2 will make the European Union increasingly passive vis-à-vis national interests. The European Union's institutions will be absorbed in operations of damage control of its own policies.** The

European Union's potential to shape important decisions that could provide public goods for European citizens will be blocked. Under the circumstances, new legitimacy-enhancing democratic devices will be needed in order to ground European Union institutions and decisions into a more solid basis of citizen acceptance at national and European levels.

In line with these scenarios, four policy options can be identified.

## RECOMMENDATIONS FOR POLICY-MAKERS

**POLICY OPTION 1** **Reform the European Citizens' Initiative:** A text that has been presented and passed the test of formal requirements would trigger automatically a binding vote in the European Parliament and the Council.

This reform will enhance the possibility of direct policy input by the citizens at the European Union level. The effects are potentially legitimacy-enhancing for the European Union as a polity. But all research points to the fact that agenda initiatives are structurally weak instruments to increase legitimacy.

The reform will leave the rest of the decisions on primary and secondary legislation untouched and will not increase the acceptability of those decisions.

The citizens could misunderstand the device's formal limitations and be frustrated that their proposal is rejected.

**POLICY OPTION 2** **Facultative European Union-wide referendum on secondary legislation:** This instrument would replace national plebiscites on secondary European Union law. With conditions similar to the European Citizens' Initiative of collecting signatures in a certain number of European Union member states, the referendum would trigger a binding European Union-wide vote on certain decisions of secondary legislation that have been taken at the European Union level. The secondary legislation is accepted if a simple majority of citizens and of government officials vote yes.

European Union decisions would be much more in line with the preferences of a majority of citizens and peoples of the European Union, whereby the citizens' vote could be aggregated at the European and the member state level in order to balance the two levels of citizenship.

Campaigns would be costly and potentially favour relatively powerful interest groups. However, these would still represent a wide spectrum of interests and also referenda that are mobilization-intensive as opposed to capital-intensive would be possible. Under conditions of digitalization, the mobilization of citizens becomes less and less costly.

Nevertheless, the proposal could be out of phase with national democratic traditions. Most citizens of European member states are not familiar with binding referenda. If member states do not have domestic Direct Democracy, there will be second-order voting. The proposal's legitimacy-enhancing effectiveness hinges on the introduction of Direct Democracy at the local and national level in member states. But there could also be an iterative process of introducing Direct Democracy in the European Union and the member states. Finland is a case in point for such an iterative process within the European Union. It introduced a citizens' agenda initiative as part of a constitutional reform in 2012 that was directly influenced by the concurrent implementation of the European Citizens' Initiative<sup>5</sup>.

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<sup>5</sup> See bEUcitizen report *Taking stock of the European Citizens Initiative* (2016).



**POLICY OPTION 3** **Obligatory European Union referendum on primary law:** All member states commit to ratifying new treaty dispositions, and only new treaty dispositions, by popular vote.

If the unanimity rule applies, this instrument will most probably induce a veto-bias into the procedure.

Qualified double majority would be the more apt aggregation procedure. But this would essentially mean a leap to a federal state design of the European Union similar to Switzerland.

A better coordination of referenda on primary law would be a soft way of dealing with existing problems of ratification of treaties by popular vote.

**POLICY OPTION 4** **National Parliamentary Review:** Revote European Union decisions in national parliaments. Give a significant number (majority or qualified majority) of national parliaments the possibility to block a secondary law decision that has been taken at the European Union level.

This device is in line with the traditions of representative democracy of most of European Union member states and it enhances the nexus between national and European self-government by bringing European politics closer to the national arenas and to the locus of national democracy.

European legislative decisions will be much better grounded in national democratic procedures. Decisions will be more robust and sustainable. Blame shifting to the European Union will be less possible as national parliaments have to take responsibility for decisions.

The option does not improve the legitimacy of decisions in the context of a general disenchantment with representative democracy and in contexts where national parliaments lack citizen acceptance.

## **MOVING FORWARD**

**Additional legitimacy-enhancing democratic devices in the European Union and the member states are necessary** under both of the above-mentioned scenarios.

**Direct Democracy can be a legitimacy-enhancing and relatively result-neutral procedural device of collective decision making** when it is properly designed.

**The adequate features jointly necessary are:**

- **introduction of referenda and initiatives by constitutionally-prescribed automatism or by citizen action as opposed to government action;**
- **binding result of voting as opposed to governmental discretion; C)**  
**Simplicity and unity of subject matter;**
- **application on different levels of polity, i.e. local, national, European as opposed to European Union issues at the national level only and in a highly selective manner;**
- **coordinated application of ratification votes in European Union members states.**

As an agenda initiative, the European Citizens' Initiative is a relatively weak legitimacy-enhancing instrument, even if reforms to it are implemented (Policy Option 1). Policy Option 3 (mandatory referendum on primary European Union law) becomes viable only in the context of abandoning the veto right of member states for primary legislation. Given the resilient nature of the European Union as a Staatenverbund, Policy Option 3 has serious drawbacks in the foreseeable future. Hence the favoured Direct Democracy policy option

is Policy Option 2 (facultative referendum on secondary European Union law), but this option leaps ahead of the representative democratic traditions of many member states.

As long as they do not expand in parallel Direct Democracy domestically, the European referenda will run the risk of second order voting. But this risk might not be unacceptable given the factual legitimacy gains. **An iterative learning process between the European and domestic levels is by no means impossible.**

Policy Option 4 (veto right of a majority of member states parliaments) is compatible with Policy Option 3 although best seen as an alternative that could replace 2 in the foreseeable future. Policy Option 4 is a viable option that brings European Union democracy closer to the national levels without producing a rupture with representative democratic traditions of member states.

**The next step would be a bold treaty change in which European Union member states renounce the right to hold national plebiscites on secondary European Union legislation and in return inscribe the citizens' right to call a facultative referendum with binding vote according to the principle of double majority on secondary European Union legislation in the European Union treaty.** With time, a similar right needs to be granted to citizens at the national and local level. **If this option is seen as too strongly opposed to national traditions of pure representative democracy, Policy Option 4 should be pursued. In that case, a minor treaty change could be undertaken that inscribes the rights of national parliaments to repel secondary European Union legislation by simple majority.**

## RESEARCH PARAMETERS

### OBJECTIVES OF THE PROJECT

bEUcitizen is an European Union-funded research project focused on the barriers that still exist to realise and exercise citizenship rights of European Union citizens. The project aims to:

- understand the problems European citizens experience when they try to exercise the rights provided - or perform the duties required - by the legal concept of European citizenship;
- examine where, when, and why they run into hindrances and explain their nature thereof;
- identify the causes of the existence of these barriers, both direct and indirect
- explore whether these barriers can be reduced or even lifted;
- investigate which actors have already taken initiative to do so and assess how successful have they been;
- evaluate the unintended and perhaps unwanted consequences of some possible solutions to reducing these barriers.

### METHODOLOGY OF THE PROJECT

The research into the rights of European Union citizens and the barriers to them exercising these is pursued within a multidisciplinary and multidimensional approach. By combining normative and empirical disciplines, bEUcitizen also integrated diverse methodological paradigms, tools and instruments. Taking into consideration that European Union citizenship is not only a legal principle but also a social practice as well as a historical process, the project raises mutual multidisciplinary understanding on the multidimensional character of citizenship, formulates linguistic and conceptual principles that enforce this mutual understanding and exchanges methodological approaches that improve mutual



understanding.

The research is carried out in clusters and employs the following approaches:

- a horizontal approach, dividing citizenship rights into policy domains, i.e. economic, social, civil and political rights, recognising the multidimensionality of rights;
- a vertical approach, starting from the premise that citizenship rights and duties affect various categories of citizens differently, recognising the multitudinous effects of rights on different categories of citizens;
- comparisons over time and space, providing a comparative and historical approach;
- a cross-sectoral and conceptual approach, running like a red thread through all work packages—from the beginning to the end.

## PROJECT IDENTITY

PROJECT NAME	All Rights Reserved? Barriers towards European CITIZENship (bEUcitizen)
COORDINATOR	Professor Sybe de Vries, Utrecht University, Utrecht, The Netherlands, <a href="mailto:s.a.devries@uu.nl">s.a.devries@uu.nl</a>
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<b>FURTHER READING</b>	<p>bEUCitizen report <i>Taking stock of the European Citizens Initiative: Current dynamics and possible institutional trajectories</i>, D 8.8, by Cheneval, F. et al., 2016, <a href="https://doi.org/10.5281/zenodo.56099">https://doi.org/10.5281/zenodo.56099</a>.</p> <p>bEUCitizen report <i>European Union and Direct Democracy: A possible combination?</i>, D 8.7, by Cheneval, F., and Ferrin, M., 2016, <a href="https://doi.org/10.5281/zenodo.56097">https://doi.org/10.5281/zenodo.56097</a>.</p>